No. 17-765

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

VICTOR J. STITT, II

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

NOEL J. FRANCISCO
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**REPLY BRIEF FOR THE PETITIONER**

The court of appeals' decision in this case "effectively reads 'burglary' out of" the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). Pet. App. 52a (Sutton, J., dissenting). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court defined "burglary" under the ACCA based on the "sense in which the term is now used in the criminal codes of most States." *Id.* at 598. But the court of appeals' holding—that burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can never constitute "burglary"—means that many jurisdictions would have no "burglary" offense at all. That holding contributes to a direct conflict of authority in the circuits—a division that has only grown since the petition for a writ of certiorari was filed. This Court's review is necessary to correct the court of appeals' misconstruction of a common ACCA predicate.

1. a. As the petition explains (Pet. 10-17), the court of appeals' crabbed interpretation of "burglary" is incorrect. The Tennessee aggravated-burglary statute at issue here is limited to burglary of a "habitation," defined to include certain mobile and nonpermanent structures adapted or used for overnight accommodation. See Tenn. Code Ann. § 39-14-403(a) (1997); *id.* § 39-14-401(1)(A)-(B) (Supp. 2001). As the petition details (Pet. 10-11), that provision is comparable to or narrower than nearly all state burglary statutes in existence in 1986, when the current statutory language was adopted. It therefore criminalizes "burglary" in the "generic sense" in which "the criminal codes of most States" had defined the term at that time. *Taylor*, 495 U.S. at 598.

Tennessee's aggravated-burglary provision is also narrower than the Model Penal Code's definition of burglary, which provided a model for *Taylor*'s definition of burglary as an offense "contain[ing] at least" the "elements" of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598; see *id.* at 598 n.8. Since 1980, the Model Penal Code has described burglary as occurring in "a building or occupied structure," where "occupied structure" is defined to include "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." Model Penal Code §§ 221.0(1), 221.1(1) (1980). In criminalizing the burglary of mobile and nonpermanent dwellings, Tennessee's aggravated-burglary statute—like the Model Penal Code and the burglary provisions of most States—recognizes that burglary's "inherent potential for harm to persons," *Taylor*, 495 U.S. at 588,

is not limited solely to the invasion of certain kinds of homes. See Pet. 12-13, 14.

b. Respondent does not attempt to defend the decision below based on the sources that *Taylor* considered or Congress's concern that home invasions present a particularly great risk of harm to victims. See Br. in Opp. 4-6. Instead, he repeats the errors of the court of appeals.

Respondent argues (Br. in Opp. 4) that this Court already has determined that burglary under the ACCA excludes "vehicles and moveable enclosures." But although the Court has made clear that generic burglary does not encompass *all* unlawful entry into vehicles, automobiles, and vessels, neither *Taylor* nor any of the other decisions on which respondent relies (*id.* at 5) considered whether it encompasses unlawful entry into the subset of vehicles or other nonpermanent or mobile structures that are adapted or used for overnight accommodation. See Pet. 15; Pet. App. 48a-49a (Sutton, J., dissenting) (cautioning against "the mistake of reading" parts of this Court's opinions "like a statute"); *Smith* v. *United States*, 877 F.3d 720, 725 (7th Cir. 2017) (similar), petition for cert. pending, No. 17-7517 (filed Jan. 17, 2018).

Respondent additionally contends that *Taylor*'s definition of burglary focuses "on the nature of the property or place, not the nature of its use." Br. in Opp. 11 (citation omitted). As the petition explains, however, the phrase *Taylor* employed—"building or other structure"—is not so rigid as to ignore the difference between a trailer home and a shipping trailer. Pet. 16 (citation omitted); see *Smith*, 877 F.3d at 725; Model Penal Code § 221.1(1) cmt. 3(b) (1980). *Taylor* used the term "structure" in a context where the Model Penal

Code, and the burglary statutes of many States, had defined that term to include nonpermanent or mobile dwellings. *Taylor*, 495 U.S. at 598 n.8. In any event, because "form follows function, * * * it [is] impossible for *any* definition of burglary to avoid functional considerations." Pet. App. 50a (Sutton, J. dissenting); see Pet. 16.

2. As the petition explains (Pet. 17-22), the question presented is important, recurring, and warrants this Court's review. Respondent does not dispute that burglary is a common ACCA predicate, that the courts of appeals are divided on the question presented, or that three of those courts have deemed it sufficiently important to consider it en banc. Instead, he contends (Br. in Opp. 6-14) that the circuit conflict—which has widened since the petition for a writ of certiorari was filed—is not "mature" and that a decision in this case would not affect a significant number of state burglary provisions. Those contentions are incorrect.

a. Both the court below and other courts of appeals have recognized that the circuits are divided on the question presented. See Pet. App. 12a-13a (majority opinion); see also, *e.g.*, *Smith*, 877 F.3d at 724; *United States* v. *Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017), petition for cert. pending, No. 17-766 (filed Nov. 21, 2017). The Fourth, Eighth, and Ninth Circuits have adopted the same cramped definition of generic burglary that the Sixth Circuit adopted here. See Pet. 18; *Sims*, 854 F.3d at 1039-1040; *United States* v. *White*, 836 F.3d 437, 445-446 (4th Cir. 2016); *United States* v. *Grisel*, 488 F.3d 844, 851 n.5 (9th Cir.) (en banc), cert. denied, 552 U.S. 970 (2007).[1] The Tenth Circuit, by contrast,

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[1] Respondent suggests (Br. in Opp. 11-12) that the Third and Eleventh Circuits also have held that the burglary of a nonperma-

has held that burglary of a "'vehicle that is adapted for the overnight accommodation of persons'" constitutes generic burglary because it is "analogous to the burglary of a building or house." *United States* v. *Spring*, 80 F.3d 1450, 1462 (citation omitted), cert. denied, 519 U.S. 963 (1996). The Fifth Circuit has also so held, although it has recently granted rehearing en banc on that question. See *United States* v. *Herrold*, 685 Fed. Appx. 302 (per curiam), reh'g en banc granted, 693 Fed. Appx. 272 (5th Cir. 2017).

Since the petition for a writ of certiorari was filed, the Seventh Circuit has likewise held that burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation can constitute burglary for purposes of the ACCA. In *Smith*, the court concluded that Illinois's residential burglary statute, which encompasses burglary of a "dwelling"—defined to include, *inter alia*, a "mobile home" or "trailer"—criminalizes generic burglary. 877 F.3d at 722 (quoting 720 Ill. Comp. Stat. Ann. 5/19-3(a) (West 1982); *id.* 5/2-6 (West 2016)). The court found it "unlikely" that *Taylor*, which "set out to create a federal common-law definition of 'burglary'" that would capture "'the generic sense in which the term is now used in the criminal

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nent or mobile structure adapted or used for overnight accommodation cannot constitute generic burglary for purposes of the ACCA. But the decisions respondent cites address statutes reaching nonpermanent or mobile structures adapted for carrying on business as well as for overnight accommodation. See *United States* v. *Bennett*, 100 F.3d 1105, 1109 (3d Cir. 1996); *United States* v. *Lockett*, 810 F.3d 1262, 1270 (11th Cir. 2016); *United States* v. *Howard*, 742 F.3d 1334, 1347-1349 (11th Cir. 2014); *United States* v. *Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010), cert. denied, 562 U.S. 1161 (2011). They therefore do not directly address the question presented here.

codes of most States,'" had "adopt[ed] a definition of generic burglary that is satisfied by no more than a handful of states—if by any." *Id.* at 723-724 (quoting *Taylor*, 495 U.S. at 598). The court also observed that "[i]f defendants in these cases are right, then the Justices *said* that they were following the Model Penal Code's approach but *did* the opposite." *Id.* at 725.

Although respondent acknowledges (Br. in Opp. 14) this division of authority, he attempts to minimize it. Respondent contends (*id.* at 9) that the Tenth Circuit's decision in *Spring*, *supra*, is "without support" because it relied on a Ninth Circuit decision that was later overruled in *Grisel*, *supra*, and a Fifth Circuit decision that may be affected by the en banc decision in *Herrold*, *supra*. But *Spring* stands on its own two feet, see 80 F.3d at 1462 (discussing *Taylor*), and the Tenth Circuit has applied its holding after *Grisel*. See *United States* v. *Patterson*, 561 F.3d 1170 (2009), cert. denied, 558 U.S. 1150 (2010). But see *United States* v. *Robinson*, No. 17-6046, 2018 WL 329053, at *5-*6 (10th Cir. Jan. 9, 2018) (Holmes, J., concurring) (questioning *Spring*'s "vitality").[2] In any event, as respondent recognizes

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[2] Nor is respondent correct (Br. in Opp. 10) that *Spring* and *United States* v. *Scoville*, 561 F.3d 1174 (10th Cir.), cert. denied, 558 U.S. 888 (2009), create "an intra-circuit conflict" that "should be addressed by the Tenth Circuit." *Scoville* considered a defendant's third-degree burglary convictions under Ohio law, which extended to certain nonpermanent and mobile "habitation[s]" if an individual was "present or likely to be present." 561 F.3d at 1179 & n.5 (quoting Ohio Rev. Code Ann. § 2911.12 (1993); *id.* § 2911.12 (1999)). *Scoville* stated without analysis that the governing statutes were "overbroad under *Taylor*," *id.* at 1179, but the court did not cite or attempt to distinguish *Spring*. The court in *Scoville* may have relied on an erroneous concession by the government that the third-

(Br. in Opp. 14), even if the Tenth Circuit's position were in doubt, the circuit conflict—which has expanded during the pendency of this petition—would remain.

b. Respondent separately contends (Br. in Opp. 6-7 & n.6) that the question presented does not warrant this Court's review on the theory that it would affect the classification of only six States' burglary statutes. According to respondent (*ibid.*), the other 38 jurisdictions whose burglary statutes covered nonpermanent or mobile structures as of 1986 currently "do not limit" those provisions to structures adapted or used for overnight accommodation.

Respondent miscalculates the number of state provisions at issue. He overlooks that jurisdictions often have multiple burglary statutes, with both a basic burglary law that extends broadly and (as in Tennessee's case) one or more aggravated versions that are limited to "dwellings" or "habitations." In fact, at least 20 jurisdictions currently define separate burglary offenses that reach only those nonpermanent or mobile structures that are adapted or used for overnight accommodation.[3] This Court's consideration of the question presented would thus resolve the classification of at least

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degree burglary statute was overbroad because it "address[ed] permanent or temporary habitations, which are not necessarily buildings, structures, or enclosed spaces (i.e. boats, vehicles, etc.)." Gov't Br. at 3, *Scoville*, *supra* (No. 07-8094); see *Scoville*, 561 F.3d at 1179.

[3] See Ala. Code § 13A-7-1(2) (LexisNexis Supp. 2017) (defining "dwelling"); *id.* § 13A-7-5(a) (LexisNexis 2015) (first-degree burglary of a "dwelling"); Alaska Stat. § 11.46.300 (2016) (first-degree burglary of a "dwelling"); *id.* § 11.81.900(a)(22) (defining "dwelling"); Ark. Code Ann. § 5-39-101(8)(A) (Supp. 2017) (defining "residential occupiable structure"); *id.* § 5-39-201(a) (2013) (burglary of a "residential occupiable structure"); Conn. Gen. Stat. Ann. § 53a-100(a)(2) (West 2012) (defining "dwelling"); *id.* § 53a-102 (second-

one burglary statute in at least 20 States, even if some of those States have other burglary statutes that cover

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degree burglary of a "dwelling"); Del. Code Ann. tit. 11, § 825(a)(1) (2015) (second-degree burglary of a "dwelling"); *id.* § 826 (first-degree burglary of a "dwelling"); *id.* § 829(b) (defining "[d]welling"); Ga. Code Ann. § 16-7-1(b) (Supp. 2017) (first-degree burglary of a "dwelling house" or other "structure designed for use as the dwelling of another"); Haw. Rev. Stat. Ann. § 708-800 (LexisNexis 2016) (defining "[b]uilding" and "[d]welling"); *id.* § 708-810 (first-degree burglary of a "building" or "dwelling"); 720 Ill. Comp. Stat. Ann. 5/2-6 (West 2016) (defining "dwelling"); *id.* 5/19-3 (West Supp. 2017) (residential burglary); Kan. Stat. Ann. § 21-5111(k) (Supp. 2016) (defining "[d]welling"); *id.* § 21-5807(a)(1) and (b)(1) (burglary of a "[d]welling" and aggravated burglary of a "[d]welling"); Ky. Rev. Stat. Ann. § 511.010(2) (LexisNexis 2014) (defining "[d]welling"); *id.* § 511.030 (second-degree burglary of a "dwelling"); Me. Rev. Stat. Ann. tit. 17-A, § 2(10) and (24) (Supp. 2017) (defining "[d]welling place" and "[s]tructure"); *id.* § 401(1)(A) and (B)(4) (burglary of a "structure" or "dwelling place"); Mich. Comp. Laws Ann. § 750.110a(1)(a) (West 2004) (defining "[d]welling"); *id.* § 750.110a(2) and (3) (first- and second-degree home invasion of a "dwelling"); N.Y. Penal Law § 140.00(3) (McKinney 2010) (defining "dwelling"); *id.* § 140.30 (first-degree burglary of a "dwelling"); N.D. Cent. Code §§ 12.1-05-12(2), 12.1-22-06(1) (2012) (defining "[d]welling"); *id.* § 12.1-22-02(1) (treating burglary of a "building or occupied structure" as a different class of felony if it occurs in a "dwelling"); Or. Rev. Stat. § 164.205(2) (2017) (defining "[d]welling"); *id.* § 164.225 (first-degree burglary of a "dwelling"); S.C. Code Ann. § 16-11-310(2) (2015) (defining "[d]welling"); *id.* § 16-11-311 (first-degree burglary of a "dwelling"); Tenn. Code Ann. § 39-14-401 (2014) (defining "[h]abitation"); *id.* § 39-14-403 (aggravated burglary of a "habitation"); Tex. Penal Code Ann. § 30.01(1) (West Supp. 2017) (defining "[h]abitation"); *id.* § 30.02(a) and (d)(1) (first-degree burglary of a "habitation"); Utah Code Ann. § 76-6-201(2) (LexisNexis 2017) (defining "[d]welling"); *id.* § 76-6-202(2) (second-degree felony burglary of a "dwelling"); W. Va. Code Ann. § 61-3-11(a)-(b) (LexisNexis 2014) (burglary of a "dwelling house"); *id.* § 61-3-11(c) (defining "dwelling house").

additional types of nonpermanent or mobile structures.[4] Moreover, a clarification of *Taylor* in this case could inform the classification of those other, broader statutes, whose ubiquity reinforces that "generic" burglary at a minimum encompasses the more limited type of statute at issue here.

3. Respondent errs in suggesting (Br. in Opp. 14-15) that this case is not a suitable vehicle for deciding the question presented. He contends (*ibid.*), for the first time in this Court, that even if burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation constitutes ACCA burglary, "Tennessee's aggravated burglary statute * * * still [would be] overbroad," on the theory that it "does not require a mental state for entering the habitation" and can be violated by "reckless conduct."

That contention, which confuses different portions of the ACCA's definition of a "violent felony," lacks merit. Petitioner cites decisions of this Court and the Sixth Circuit addressing whether crimes that can be committed recklessly or accidentally qualify as violent felonies under the ACCA's now-invalidated residual clause (covering offenses that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii)); its force clause (covering offenses that have "as an element the use, attempted use,

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[4] Respondent suggests (Br. in Opp. 7 & n.6) that *Taylor* determined that Texas's burglary statute was non-generic when it described Texas Penal Code Ann. §§ 30.01-30.05 (1989 & Supp. 1990) as "defining burglary to include theft from coin-operated vending machine[s] or automobile[s]." *Taylor*, 495 U.S. at 591. But *Taylor* did not specifically consider Texas Penal Code Ann. § 30.02(a) and (d)(1), which criminalizes burglary of a "[h]abitation," defined to include "a structure or vehicle that is adapted for the overnight accommodation of persons," *id.* § 30.01(1).

or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i)); or similarly worded clauses outside the context of the ACCA. See *Begay* v. *United States*, 553 U.S. 137, 145 (2008) (reckless conduct under residual clause); *Leocal* v. *Ashcroft*, 543 U.S. 1, 9-11, 13 (2004) (accidental conduct under 18 U.S.C. 16); *Jones* v. *United States*, 689 F.3d 621, 626 (6th Cir. 2012) (reckless conduct under force clause); see also *Johnson* v. *United States*, 135 S. Ct. 2551 (2015) (holding ACCA's residual clause unconstitutionally vague). But whether or not those clauses encompass reckless or accidental conduct, see *Voisine* v. *United States*, 136 S. Ct. 2272, 2276, 2278-2282 (2016) (holding that reckless conduct can constitute "use of physical force" under provision similar to the force clause), they are not at issue here.

This case instead turns on the meaning of "burglary" in the ACCA's enumerated-felonies clause, which defines "violent felony" to include any felony that "is burglary, arson, or extortion, [or] involves use of explosives," 18 U.S.C. 924(e)(2)(B)(ii). *Taylor* specifies only one *mens rea* requirement for ACCA "burglary," namely, that the "unlawful or unprivileged entry into, or remaining in, a building or structure" occur "with intent to commit a crime." 495 U.S. at 599. The Tennessee statute at issue here includes that same requirement: the defendant must enter or remain in a habitation without the owner's consent and "with the intent to commit" a crime. Tenn. Code Ann. § 39-14-402(a) (1997); see *id.* § 39-14-403; see also Br. in Opp. 16 (citing jury instructions). The court below concluded that the statute falls outside the definition of generic burglary solely on the ground that it applies to nonpermanent

and mobile dwellings. That erroneous conclusion warrants this Court's review.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
*Solicitor General*

FEBRUARY 2018